

NORTH DAKOTA CENTURY CODE

CHAPTER 61-32 - WETLANDS

61-32-01. Legislative policy and intent. Repealed by S.L. 1995, ch. 599, § 3.

61-32-02. Definitions. Repealed by S.L. 1995, ch. 599, § 3.

61-32-03. Permit to drain waters required - Penalty. Any person, before draining a pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty acres [32.37 hectares] or more, shall first secure a permit to do so. The permit application must be submitted to the state engineer. The state engineer shall refer the application to the water resource district or districts within which is found a majority of the watershed or drainage area of the pond, slough, lake, or sheetwater for consideration and approval, but the state engineer may require that applications proposing drainage of statewide or interdistrict significance be returned to the state engineer for final approval. A permit may not be granted until an investigation discloses that the quantity of water which will be drained from the pond, slough, lake, or sheetwater, or any series thereof, will not flood or adversely affect downstream lands. If the investigation shows that the proposed drainage will flood or adversely affect lands of downstream landowners, the water resource board may not issue a permit until flowage easements are obtained. The flowage easements must be filed for record in the office of the recorder of the county or counties in which the lands are situated. An owner of land proposing to drain shall undertake and agree to pay the expenses incurred in making the required investigation. This section does not apply to the construction or maintenance of any existing or prospective drain constructed under the supervision of a state or federal agency, as determined by the state engineer.

Any person draining, or causing to be drained, a pond, slough, lake, or sheetwater, or any series thereof, which has a watershed area comprising eighty acres [32.37 hectares] or more, without first securing a permit to do so, as provided by this section, is liable for all damage sustained by any person caused by the draining, and is guilty of an infraction. As used in this section, sheetwater means shallow water that floods land not normally subject to standing water. The state engineer may adopt rules for temporary permits for emergency drainage.

History: Enacted 1987; amended 1991, 1995, 1997, 2001.

61-32-04. Administration - Rulemaking authority - Guidelines. Repealed by S.L. 1995, ch. 599, § 3.

61-32-05. Wetlands bank. Repealed by S.L. 1995, ch. 599, § 3.

61-32-06. Uniform wetlands classification. Repealed by S.L. 1995, ch. 599, § 3.

61-32-07. Closing noncomplying drain - Notice and hearing - Appeal - Injunction - Frivolous complaints. Only a landowner experiencing flooding or adverse effects from an unauthorized drain constructed before January 1, 1975, may file a complaint with the water resource board. Any person may file a complaint about an unauthorized drain constructed after January 1, 1975. Upon receipt of a complaint of unauthorized drainage, the water resource board shall promptly investigate and make a determination of the facts with respect to the complaint. If the board determines that a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to this title or any rules adopted by the board, the board shall notify the landowner by registered mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if known. The notice must specify the nature and extent of the noncompliance and must state that if the drain, lateral drain, or ditch is not closed or filled within a reasonable time as the board determines, but not less than fifteen days, the board shall procure the closing or filling of the drain, lateral drain, or ditch and assess the cost of the closing or filling, or the portion the board determines, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date the notice is mailed, may demand, in writing, a hearing on the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received. In the event of an emergency, the board may immediately apply to the appropriate district court for an injunction prohibiting the landowner or tenant from constructing or maintaining the drain, lateral drain, or ditch and ordering the closure of the illegal drain. Assessments levied under this section must be collected in the same manner as assessments authorized by chapter 61-16.1. If, in the opinion of the board, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. A person aggrieved by action of the board under this section may appeal the decision of the board to the district court of the county in which the land is located in accordance with the procedure provided in section 28-34-01. A hearing as provided for in this section is not a prerequisite to an appeal. If, after the first complaint, in the opinion of the board, the complaint is frivolous, the board may assess the costs of the frivolous complaint against the complainant.

History: Enacted 1987; amended 1989, 1991, 1995, 1999.

61-32-08. Appeal of board decisions - State engineer review - Closing of noncomplying drains. The board shall make the decision required by section 61-32-07 within a reasonable time, but not to exceed one hundred twenty days, after receiving the complaint. The board shall notify all parties of its decision by certified mail. The board's decision may be appealed to the state engineer by any aggrieved party. The appeal to the state engineer must be made within thirty days from the date notice of the board's decision has been received. The appeal must be made by submitting a written notice to the state engineer which must specifically set forth the reason why the board's decision is erroneous. The appealing party shall also submit copies of the written appeal notice to the board and to the nonappealing party. Upon receipt of this notice the board, if it has ordered closure of a drain, lateral drain, or ditch, is relieved of its obligation to procure the closing or filling of the drain, lateral drain, or ditch. The state engineer shall handle the appeal by conducting an independent investigation and making an independent determination of the matter. The state engineer may enter property affected by the complaint for the purpose of investigating the complaint.

If the board fails to investigate and make a determination concerning the complaint within a reasonable time, but not to exceed one hundred twenty days, the person filing the complaint may file such complaint with the state engineer. The state engineer shall, without reference to chapter 28-32, cause the investigation and determination to be made, either by action against the board, or by personally conducting the investigation and personally making the determination.

If the state engineer determines that a drain, lateral drain, or ditch has been opened or established by a landowner or tenant contrary to title 61 or any rules adopted by the board, the state engineer shall take one of three actions:

1. Notify the landowner by registered mail at the landowner's post-office address of record;
2. Return the matter to the jurisdiction of the board along with the investigation report; or
3. Forward the drainage complaint and investigation report to the state's attorney.

If the state engineer decides to notify the landowner, the notice must specify the nature and extent of the noncompliance and must state that if the drain, lateral drain, or ditch is not closed or filled within such reasonable time as the state engineer shall determine, but not less than thirty days, the state engineer shall procure the closing or filling of the drain, lateral drain, or ditch and assess the cost thereof, against the property of the landowner responsible. The notice from the state engineer must state that the affected landowner may, within fifteen days of the date the notice is mailed, demand, in writing, a hearing on the matter. Upon receipt of the demand, the state engineer shall set a hearing date within fifteen days from the date the demand is received. If, in the opinion of the state engineer, more than one landowner or tenant

has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners. Upon assessment of costs, the state engineer shall certify the assessment to the county auditor of the county where the noncomplying drain, lateral drain, or ditch is located. The county auditor shall extend the assessment against the property assessed. Each assessment must be collected and paid as other taxes are collected and paid. Assessments collected must be deposited with the state treasurer and are hereby appropriated out of the state treasury and must be credited to the contract fund established by section 61-02-64.1. Any person aggrieved by action of the state engineer under the provisions of this section may appeal the decision of the state engineer to the district court in accordance with chapter 28-32. A hearing by the state engineer as provided for in this section shall be a prerequisite to such an appeal.

If the state engineer, after completing the investigation required under this section, decides to return the matter to the board, a complete copy of the investigation report shall be forwarded to the board and it shall include the nature and extent of the noncompliance. Upon having the matter returned to its jurisdiction the board shall carry out the state engineer's decision in accordance with the terms of this section.

If the state engineer, after completing the investigation required under this section, decides to forward the drainage complaint to the state's attorney, a complete copy of the investigation report must also be forwarded, which must include the nature and extent of the noncompliance. The state's attorney shall prosecute the complaint in accordance with the statutory responsibilities prescribed in chapter 11-16.

In addition to the penalty imposed by the court in the event of conviction under this statute, the court shall order the drain, lateral drain, or ditch closed or filled within such reasonable time period as the court determines, but not less than thirty days. If the drain, lateral drain, or ditch is not closed or filled within the time prescribed by the court, the court shall procure the closing or filling of the drain, lateral drain, or ditch, and assess the cost thereof against the property of the landowner responsible, in the same manner as other assessments under chapter 61-16.1 are levied. If, in the opinion of the court, more than one landowner or tenant has been responsible, the costs may be assessed on a pro rata basis in proportion to the responsibility of the landowners.

The authority granted in this section may only be exercised for drainage constructed after January 1, 1987.

History: Enacted 1987.

61-32-09. Wetlands replacement fund - Continuing appropriation. Repealed by S.L. 1995, ch. 599, § 3.

61-32-10. Exemption. The wetland replacement requirements of sections 61-32-01 through 61-32-11 do not apply to surface coal mining operations until reclamation of the wetland area begins pursuant to chapter 38-14.1.

History: Enacted 1987.

61-32-11. Application of prior law. Repealed by S.L. 1995, ch. 599, § 3.

NORTH DAKOTA ADMINISTRATIVE CODE

ARTICLE 89-02 DRAINAGE OF WATER

CHAPTER 89-02-01 DRAINAGE OF PONDS, SLOUGHS, LAKES, OR SHEETWATER, OR ANY SERIES THEREOF, AND OF MEANDERED LAKES

89-02-01-01. Intent. This chapter establishes rules for processing applications for permits to drain certain ponds, sloughs, lakes, or sheetwater, or any series thereof, and meandered lakes, as required by North Dakota Century Code sections 61-15-08 and 61-32-03.

History: Amended effective December 1, 1979; August 1, 1994; February 1, 1997; June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-15-08, 61-32-03

89-02-01-02. Definitions. Unless the context otherwise requires, the following definitions apply:

1. "Assessment drain" means a drain constructed pursuant to North Dakota Century Code chapter 61-16.1 or 61-21.
2. "Board" means the board of managers of a water resource district.
3. "District" means water resource district.
4. "Drain" includes any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains of any nature or description constructed for such purpose, including dikes and other appurtenant works. This definition may include more than one watercourse or artificial channel constructed for the aforementioned purpose when the watercourses or channels drain land within a practical drainage area.
5. "Lake" means a well-defined basin which characteristically holds water throughout the year. Lakes go dry only after successive years of below normal runoff and precipitation.
6. "Lateral drain" for the purpose of regulating the drainage of water means a drain constructed after the establishment and construction of the original drain or drainage system and which flows into such original drain or drainage system from outside the limits of the original drain.

7. "Maintenance" means removal of silt and vegetation from a drain. Maintenance does not include deepening or widening a drain.
8. "Meandered lake" means any pond, slough, or lake which has had its boundaries established by metes and bounds in the survey of public lands by the government of the United States.
9. "Party of record" means each person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.
10. "Person" means a person, firm, partnership, association, corporation, or any other type of private legal relationship, and any governmental organization, which includes any agency of the United States, a state agency, and any political subdivision of the state.
11. "Pond" means a well-defined land depression or basin that holds water in normal years throughout the summer. Ponds generally go dry only in years of below normal runoff and precipitation.
12. "Series of ponds, sloughs, lakes, or sheetwater" means two or more ponds, sloughs, lakes, or sheetwater that are hydrologically linked naturally or artificially.
13. "Sheetwater" is defined by North Dakota Century Code section 61-32-03, which provides that sheetwater means shallow water that floods land not normally subject to standing water.
14. "Slough" includes two types:
 - a. Seasonal slough: a depression which holds water in normal years from spring runoff until mid-July. In years of normal runoff and precipitation, a seasonal slough is usually not tilled but can be used for hayland or pasture. In low runoff, dry years, these areas generally are tilled for crop production, but commonly reflood with frequent or heavy summer or fall rains.
 - b. Temporary slough: a shallow depressional area that holds water or is waterlogged from spring runoff until early June. In years of normal runoff and precipitation, a temporary slough is usually tilled for crop production. In years of high runoff or heavy spring rain, a temporary slough may not dry out until mid-July and generally would not be tilled but may be used for hayland or pasture. A temporary slough frequently refloods during heavy summer and fall rains.

15. "State engineer" means the state engineer, appointed pursuant to North Dakota Century Code section 61-03-01, or the state engineer's designee.
16. "Supplemental public hearing" means a hearing held to review evidence not contained in the record of the state engineer's public hearing.
17. "Watercourse" is defined by North Dakota Century Code section 61-01-06. That section provides: "A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character." Watercourse, for the purposes of this chapter, also means an outlet channel utilized to carry drained water from the outlet of the drain to a watercourse, as defined by section 61-01-06.
18. "Watershed" means the area which drains into a pond, slough, lake, or sheetwater, or any series thereof.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-15-08, 61-32-03

89-02-01-03. Permit required.

1. A permit is required before any person may construct a drain for the purpose of draining waters from a pond, slough, lake, or sheetwater, or any series thereof, having a watershed of eighty acres [32.37 hectares] or more.
2. A permit is required before any person may drain by pumping a pond, slough, lake, or sheetwater, or any series thereof, having a watershed of eighty acres [32.37 hectares] or more.
3. A permit is required before any person may drain, cause to be drained, or attempt to drain any meandered lake.
4. A permit is required for an assessment drain constructed pursuant to North Dakota Century Code chapter 61-16.1 or 61-21.
5. A permit is required for the construction of any lateral drain.

6. A permit is required before any person may modify the drainage authorized in the original permit. Modification of drainage includes deepening and widening of a drain, or the extension of any drain.
7. A permit is required before any person may fill a pond, slough, lake, or sheetwater which has a watershed of eighty acres [32.37 hectares] or more, for the purpose of causing the pond, slough, lake, or sheetwater to be drained by elimination of all or a portion of the existing storage.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-15-08, 61-32-03

89-02-01-04. Permits for assessment drains. Repealed effective February 1, 1997.

89-02-01-05. Exceptions to permit required.

1. A drainage permit under section 89-02-01-03 is not required for maintenance of a drain.
2. The provisions of section 89-02-01-03, except subsection 3, do not apply to any drain constructed under the direct and comprehensive supervision of the federal or state agencies specified in this section. The agencies deemed capable of providing supervision and analyzing downstream impacts are:
 - a. The state water commission;
 - b. The army corps of engineers;
 - c. The natural resources and conservation service, for projects constructed pursuant to the Watershed Protection and Flood Prevention Act [Pub. L. 83-566; 16 U.S.C. 1001];
 - d. The bureau of reclamation, for projects that are part of the originally authorized Garrison diversion unit authorized in 1965;
 - e. The state department of transportation, for federal aid projects; and
 - f. The public service commission for surface mining projects.

However, these agencies shall notify the state engineer of any proposed drainage projects under their direct supervision during the planning stages.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; April 1, 2004.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-15-08, 61-32-03

89-02-01-06. Determination of watershed area. The determination of the watershed area must be made using accurate or reliable maps or surveys. Published seven and one-half minute topographic maps or a survey conducted under the supervision of a registered land surveyor are preferred. This information may be supplemented by aerial photographs of the watershed or by an onsite investigation if requested by the applicant or the local water resource board, or if the state engineer determines it is necessary.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-15-08, 61-32-03

89-02-01-07. Filing application. Any person desiring a drainage permit shall file an application with the state engineer on a form provided by the state engineer. The applicant, if requested by the state engineer or the board, shall provide an engineering analysis showing the downstream impacts of the proposed drainage. The analysis, at the discretion of the state engineer or the board may include a determination of the capacity of the drain and the receiving watercourse and a comparison of volume and timing of predrainage and postdrainage flows. If the application is incomplete, or if the information contained therein is insufficient to enable the state engineer or the appropriate district to make an informed decision on the application, the application must be returned to the applicant for correction.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-15-08, 61-32-03

89-02-01-08. Referral of applications to appropriate district. Upon receipt of a properly completed application, the state engineer shall determine whether the application involves drainage of statewide or interdistrict significance using the factors set out in section 89-02-01-09. The state engineer shall attach to the application any comments, recommendations, and engineering data that may assist the appropriate district in making a determination on the application. The application must then be referred to the appropriate district within which is found a majority of the watershed or drainage area of the pond, slough, lake, or sheetwater, or any series thereof.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997; June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-15-08, 61-32-03

89-02-01-09. Criteria for determining whether drainage is of statewide or interdistrict significance. In determining whether the proposed drainage is of statewide or interdistrict significance, the state engineer shall be guided by the following criteria:

1. Drainage which would affect property owned by the state or its political subdivisions.
2. Drainage of sloughs, ponds, or lakes having recognized fish and wildlife values.
3. Drainage or partial drainage of a meandered lake.
4. Drainage which would have a substantial effect on another district.
5. Drainage which would convert previously noncontributing areas (based on twenty-five year event - four percent chance) into permanently contributing areas.
6. For good cause, the state engineer may classify any proposed drainage as having statewide or interdistrict significance, or the state engineer may determine that certain proposed drainage is not of statewide or interdistrict significance.

History: Amended effective December 1, 1979; October 1, 1982; February 1, 1997.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-15-08

89-02-01-09.1. Board procedure for processing applications to drain.

1. The board shall use the procedure in this subsection when it processes a drainage permit application that the state engineer has determined is of statewide or interdistrict significance:
 - a. Upon receipt of an application to drain from the state engineer, the board shall set the date, time, and place for a meeting at which it will receive information concerning the merits of, as well as any testimony or information pertinent to the application. At the

applicant's expense, the board shall also give notice by mail not less than twenty days from the date set for consideration of the drainage application to:

- (1) The applicant.
 - (2) All record title owners of real estate and holders of a contract for deed whose property would be crossed by the proposed drain.
 - (3) All downstream riparian landowners on the watercourse into which water will be drained who are adversely impacted as determined by the board.
 - (4) Any board that would be substantially affected by the water to be drained.
 - (5) The state game and fish department.
 - (6) The state department of health.
 - (7) The state highway commissioner, county commissioners, and board of township supervisors if the proposed drainage will affect or cross the right of way of any public highway or road within their jurisdiction.
 - (8) The state engineer.
 - (9) Any person who has made a written request for notification of that project and has advanced the cost of providing that notification. Such advance may not exceed ten dollars.
- b. Notice must also be published in a newspaper of general circulation in the area of the proposed drainage once a week for two consecutive weeks. Final notice must be published not more than fifteen days nor less than five days from the date set for the meeting.
- c. The notice must give the essential facts of the proposed drain including name and address of applicant; legal description of the area to be drained; purpose of the drainage; watercourse into which the water will be drained; legal description of the confluence of the drain and the watercourse into which the water will be drained; the time, date, and place of the board's consideration of the application; and the location and date of availability of information regarding the project.

- d. At least fourteen days prior to the date set by the board for its meeting to receive information on the application, the applicant shall submit to the board all documentary information the applicant intends to present at the board's meeting. The board shall immediately place such information in the board's office if the office is open for public access at least twenty hours each week, or if the board's office is not open to the public at least twenty hours each week, in custody of the auditor of the county in which the majority of the watershed of the drain is to be built. The information must be available for public review. The board shall notify the applicant of this requirement upon its receipt of an application to drain. If the information is placed in the auditor's office, the auditor shall return the information to the board one working day prior to the board's meeting.
- e. The board shall allow submission of all relevant oral or written evidence.
- f. In evaluating applications, the board shall consider the factors in section 89-02-01-09.2.
- g. The meeting at which the board receives information concerning the application must be recorded either stenographically or electronically. If the board approves the permit application, the record and all documentary information received by the board must be transferred to the state engineer. Upon request of the state engineer, the board shall provide a transcript of the meeting. The cost of providing a transcript must be borne by the applicant.
- h. At the conclusion of the meeting at which the board receives information about the proposed drain, the board shall announce that:
 - (1) The board's denial of a permit constitutes final denial of the permit. Appeals of a denial must be taken to the district court within thirty days.
 - (2) A board-approved application will be forwarded to the state engineer.
 - (3) Those who wish to be notified of the board's decision shall so notify the board and shall provide their names and addresses in writing to the board at the end of the meeting.

- (4) The board shall send notice of the board's decision along with a copy of the board's determination and rationale to all parties of record, to anyone who has requested in writing to be notified, and to the state engineer.
 - i. If the board denies the application, it shall return the application to the applicant along with a copy of the board's determination and rationale. A copy of the board's denial and rationale must also be sent to all parties of record, to anyone who has requested in writing to be notified, and to the state engineer.
 - j. If the board approves the application, the board's approval must be noted on the application and a copy of the determination sent to the applicant. The board shall send notice of the board's decision along with a copy of the board's determination and rationale to all parties of record and to anyone who has requested in writing to be notified. The application, a copy of the determination, and all information reviewed by the board in considering the application must be forwarded to the state engineer for review within twenty days of the determination. The board's decision approving the application must contain a determination of the location and size, in surface acres, of ponds, sloughs, and lakes to be drained by the proposed drain. A seven and one-half minute topographic map indicating the location and size of the ponds, sloughs, and lakes approved for drainage must be attached to the determination.
 - k. The board's notice to an applicant must state that the board's approval of the application is not a permit to drain until the state engineer has also approved the application.
2. The board shall use the following procedure when it processes a drainage permit application that the state engineer has determined is not of statewide or interdistrict significance:
- a. The board shall review the permit application and any supporting documentation and determine whether protection of public and private interests would be better served by a specific public meeting to consider the project. If it is determined a specific public meeting is necessary to protect public and private interests, the board shall process the permit application in accordance with procedures established by the board.
 - b. If the board determines a specific public meeting is unnecessary, the board shall consider the project pursuant to the criteria set forth in section 89-02-01-09.2 and shall deny or grant the application with or without modifications or conditions based upon those

criteria. Written notice of the board's decision must be provided to all parties of record, to anyone requesting in writing notice of the decision, and to the state engineer.

History: Effective February 1, 1997.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.2. Evaluation of applications - Factors considered. The state engineer, for applications of statewide or interdistrict significance, and the board, for all applications to drain, shall consider the following factors:

1. The volume of water proposed to be drained and the impact of the flow or quantity of this water upon the watercourse into which the water will be drained.
2. Adverse effects that may occur to the lands of lower proprietors. This factor is limited to the project's hydrologic effects such as erosion, duration of floods, impact of sustained flows, and impact on the operation of downstream water control devices.
3. The engineering design and other physical aspects of the drain.
4. The project's impact on flooding problems in the project watershed.
5. The project's impact on ponds, sloughs, streams, or lakes having recognized fish and wildlife values.
6. The project's impact on agricultural lands.
7. Whether easements are required.
8. Other factors unique to the project.

History: Effective February 1, 1997; amended effective April 1, 2000.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-01-26, 61-16.1-10, 61-32-03

89-02-01-09.3. Time for determination by board. Within sixty days after receipt from the state engineer of an application to drain, the board shall make a determination on the application. This time limit may be extended only with the written consent of the state engineer. A request for an extension of time under this section must be in writing to the state engineer and must set forth the reason for requesting the time extension.

In applications involving assessment drains, the sixty-day time period does not commence until the date the assessments are finally established by the board and are no longer subject to appeal to a court of law or the state engineer.

History: Effective February 1, 1997.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.4. Evaluation of applications by the state engineer of statewide or interdistrict significance - Information to be used. In the state engineer's evaluation of an application of statewide or interdistrict significance, the state engineer shall use all relevant documentary information submitted and oral testimony given for the board's consideration at its meeting. The state engineer may also use any information in the files and records retained by the state engineer's office or engineering information developed or obtained through investigation of the project area by the state engineer's staff. The information used must be relevant and is part of the record.

The state engineer may also request information and comment from independent sources. However, the state engineer is not required to delay the state engineer's decision on an application for more than thirty days from the date of request while waiting for comment from these sources.

History: Effective February 1, 1997.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-06, 61-32-03

89-02-01-09.5. Procedure, availability, and contents of notice of state engineer's decision to grant or deny application of statewide or interdistrict significance.

1. If the state engineer determines an application of statewide or interdistrict significance should be denied, the state engineer shall provide a copy of the determination to the parties of record. If the state engineer determines an application should be granted, with or without conditions, the state engineer shall provide a copy of the determination to all parties of record. Other members of the public may view the record at the Office of the State Engineer, 900 East Boulevard, Bismarck, during normal business hours.
2. One copy of the determination to grant or deny a permit may be provided to persons not provided copies pursuant to subsection 1 upon written request. Additional copies will be provided upon payment for necessary copying, handling, and postage.

3. Copies of the notice of the state engineer's determination must be provided to persons who made a written request for notice of that project not more than two months, or later than one day, prior to the date of the state engineer's decision.
4. The notice of decision must include the name of the drain; the applicant's name; whether the application was granted or denied and the date of the decision; the availability of the full text of the decision; and the fact that within thirty days of the date of the state engineer's decision a hearing may be requested on the project. The notice must also state that a valid request for a hearing must be in writing; must specifically state facts from which the person requesting the hearing is factually aggrieved by the state engineer's decision; and must state what material facts, or conclusions, are believed to be erroneous and why they are believed to be erroneous.

History: Effective February 1, 1997.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-03

89-02-01-09.6. Request for state engineer's hearing. All requests for a formal hearing on a project must be made in writing to the state engineer. To be valid, a request must be made within thirty days of the date of service of the state engineer's decision. The request must be in writing and must specifically state facts from which it is evident the person requesting the hearing is factually aggrieved by the state engineer's decision; and must state which material facts or conclusions are believed to be erroneous and why they are believed to be erroneous.

History: Effective February 1, 1997.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-01-09.7. Notice of state engineer's hearing. If the state engineer determines that a request for a hearing on an application of statewide or interdistrict significance is valid and well-founded, the state engineer shall set a date for a hearing and publish notice in the official newspaper of the county within which a majority of the drainage basin is located. Publication must be once a week for two consecutive weeks. One of the publications must be published no less than twenty days before the hearing date. The person requesting the hearing shall give notice by certified mail to the state department of health, the state game and fish department, the state department of transportation, and all parties of record to the board's hearing at least twenty-one days before the date of the hearing. If such notice is not provided, the hearing may not be held. The notice must give essential information about the proposed drainage application including the date, time, and location of the hearing. All hearings will be held in Bismarck.

History: Effective February 1, 1997.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-05

89-02-01-09.8. Evidence at the state engineer's hearing. Evidence at the state engineer's hearing may be confined to the matters put in issue by any valid request of hearing described in section 89-02-01-09.7.

History: Effective February 1, 1997.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-06, 61-32-03

89-02-01-09.9. Time for determination by the state engineer - Copies of decision. Unless the state engineer determines the matters put in issue by the request for a hearing raise complex or unique issues, the state engineer shall render a decision within thirty days of the close of the state engineer's hearing. A copy of the decision must be given to all parties of record at the state engineer's hearing either personally, by certified mail, or by regular mail provided the state engineer files an affidavit of service by mail indicating upon whom a copy of the decision was served.

History: Effective February 1, 1997.
General Authority: NDCC 28-32-02, 28-32-13, 61-03-13
Law Implemented: NDCC 28-32-13

89-02-01-09.10. Consideration of evidence not contained in the state engineer's record. The record of the state engineer's hearing must be closed at the conclusion of the state engineer's formal hearing. It is in the state engineer's discretion to receive testimony and evidence that is not contained in the record. However, the state engineer, before considering any evidence not contained in the record, shall transmit the evidence to the parties of record for their examination and comment. The costs of reproducing and transmitting the evidence must be paid in advance by the party offering the evidence. Written comment or a request for a supplemental hearing must be submitted to the state engineer within ten days after transmittal of the additional evidence. Any request for a supplemental hearing must provide sufficient information to allow the state engineer to determine if a supplemental hearing is warranted. If a supplemental hearing is warranted, ten days' notice by personal service or certified mail must be afforded the parties of record to inform them of the date, time, place, and nature of the hearing. All supplemental hearings must be held in Bismarck.

History: Effective February 1, 1997.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-07

89-02-01-09.11. Conditions to permits - Extending time to complete project.

Unless otherwise specifically stated:

1. All permits must include the following conditions:
 - a. The project and the rights granted under the permit are subject to modification to protect the public health, safety, and welfare.
 - b. That construction must be completed within two years from the date of final approval.
2. All permits of statewide or interdistrict significance must include the following conditions:
 - a. All highly erodible drainage channels must be seeded to a sod-forming grass.
 - b. The vegetative cover must be adequately maintained for the life of the project or control structures must be installed, or a combination of these two criteria.
3. A permit may be extended beyond two years for good cause shown. If the permit was not of statewide or interdistrict significance when it was originally approved, a request for an extension must be approved or disapproved by the board. If the permit was of statewide or interdistrict significance when it was originally approved, a request for an extension must be approved or disapproved by the state engineer. No extension may exceed two years.

The state engineer or the board may attach other conditions to the permit if deemed necessary.

History: Effective February 1, 1997; amended effective April 1, 2000.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-15-08, 61-32-03

89-02-01-09.12. Time within which to complete construction of drain. The recipient of a permit to drain under this chapter shall complete construction within two years of the date the decision granting the permit is final. The two-year period does not begin until any appeal of the state engineer's decision or board's decision is completed, nor does it run during the course of any other legal action brought to challenge the state engineer's decision or board's decision or halt or modify the project.

If the two-year period runs before construction is completed, the permit recipient may make a written request for a one-year extension which must be approved by the board. All requests for extensions must be made at least sixty days before the end of the two-year period and must specifically state why construction has not been completed. Upon expiration of any extension, the permit recipient may request a further extension. If the request is for an extension relating to a permit that the state engineer has determined to be of statewide or interdistrict significance, the extension must be approved by both the state engineer and the board.

In the event the two-year period passes without completion of construction, an extension of the period as provided in this section, or legal process staying construction, the permit is void.

History: Effective February 1, 1997; amended effective April 1, 2004.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-13, 61-32-03

89-02-01-10. District hearing on applications of statewide or interdistrict significance. Repealed effective February 1, 1997.

89-02-01-11. Emergency drainage. Repealed effective February 1, 1997.

89-02-01-12. Notice of district hearing. Repealed effective February 1, 1997.

89-02-01-13. Content of notice of hearing. Repealed effective February 1, 1997.

89-02-01-14. Affidavit of mailing and affidavit of notice. Repealed effective December 1, 1979.

89-02-01-15. Time for determination by board of managers. Repealed effective February 1, 1997.

89-02-01-16. Consideration by the state engineer and districts. Repealed effective February 1, 1997.

89-02-01-17. Approval of drainage permit applications by district. Repealed effective February 1, 1997.

89-02-01-18. Denial of application by the district. Repealed effective February 1, 1997.

89-02-01-18.1. Notice by state engineer of public hearing on application of statewide or interdistrict significance. Repealed effective February 1, 1997.

89-02-01-18.2. Evidence presented at the state engineer's public hearing. Repealed effective February 1, 1997.

89-02-01-19. Consideration by state engineer of applications of statewide or interdistrict significance. Repealed effective February 1, 1997.

89-02-01-20. Criteria to determine whether drainage will adversely affect lands of lower landowners. Repealed effective February 1, 1997.

89-02-01-20.1. Time for determination by the state engineer. Repealed effective February 1, 1997.

89-02-01-20.2. Consideration of evidence not contained in the record. Repealed effective February 1, 1997.

89-02-01-21. Conditions to permits. Repealed effective February 1, 1997.

89-02-01-22. Requirements for a valid permit to drain. Repealed effective December 1, 1979.

89-02-01-23. Procedure upon complaint of violation. Repealed effective February 1, 1997.

89-02-01-24. Enforcement action without receipt of complaint. Repealed effective October 1, 1982.

89-02-01-25. Criminal complaint. Repealed effective October 1, 1982.

89-02-01-26. Ditches or drains existing for ten years or more. Repealed effective December 1, 1979.

89-02-01-27. Notice of drainage application denials to commissioner of agriculture. Repealed effective August 1, 1994.

89-02-01-28. Landowner assessment appeal to state engineer. A landowner's appeal to the state engineer, claiming that the landowner will receive no benefit from the construction of a new drain, must be made within ten days after the hearing on assessments. The appeal must be in writing and must specifically state the facts upon which the claim is based.

History: Effective April 1, 2000.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-21-22

**CHAPTER 89-02-02
DRAINAGE OF WETLANDS**

[Repealed effective February 1, 1997]

**CHAPTER 89-02-03
WETLANDS BANK**

[Repealed effective February 1, 1997]

CHAPTER 89-02-04 DRAINAGE COMPLAINT APPEALS

89-02-04-01. Scope of chapter. This chapter contains the procedure for appealing the decision of a water resource board on a complaint of drainage constructed without proper approval after January 1, 1987.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-02. Definitions. Unless the context otherwise provides, the following definitions apply:

1. "Affected landowner" means a person with any property interest, including a lease in land on which the drain complained of is located or land which is affected by the drain complained of.
2. "Aggrieved party" means any individual or entity who participated in the state engineer's or board's consideration of an appeal and who is actually damaged by the board's or state engineer's decision.
3. "Appeal" means an appeal from the decision of a board concerning a drain constructed after January 1, 1987.
4. "Board" means the board of the water resource district in which the complaint is brought.
5. "Complaint" is a document which alleges drainage has been conducted without proper authorization. It is filed on a form supplied to the water resource board by the state engineer.
6. "Party" includes the petitioner and any respondent, the board from which the decision is appealed, and any entity or individual which participated in the complaint process in front of the board. The designation as a party does not bestow standing to appeal a decision of the board to the state engineer or the decision of the state engineer to a court of law.
7. "Petitioner" means any aggrieved party who files a timely and proper appeal, or an affected landowner who files a timely and proper demand for hearing with the state engineer.
8. "Respondent" is a person who, within twenty days of notice of an appeal of a board's decision on a drainage complaint, files a notice with the state

engineer of the person's intent to participate in the appeal. The person who filed the complaint, and the person against whom the complaint was filed, must be either a respondent or a petitioner. These persons and the board must be allowed to participate whether or not any notice of participation is filed with the state engineer. A person may not be a respondent to an appeal of a board's decision unless the person participated by providing information to the board for its consideration.

History: Effective October 1, 1988.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-03. Filing of complaint. All complaints are filed with the water resource board in the county in which the drainage is located. Complaints filed with the state engineer will be forwarded to the board, unless the complaint is filed because of the board's inaction on a complaint.

History: Effective October 1, 1988.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-04. Complaint to state engineer - State engineer's action when board fails to act. If a board does not make a decision upon a drainage complaint within one hundred twenty days of its filing with the board, the person filing the complaint with the board may file a request for state engineer action with the state engineer. The request must include a copy of the complaint filed with the board and any documentation the landowner wishes the state engineer to consider. The state engineer shall then determine whether to commence action against the board or conduct the investigation himself.

History: Effective October 1, 1988.
General Authority: NDCC 28-32-02
Law Implemented: NDCC 61-32-08

89-02-04-05. Form of appeal. If a board makes a decision on a drainage complaint, any appeal to the state engineer must be in writing on the form prescribed by the state engineer and must include:

1. The identity of all parties to the complaint.
2. Petitioner's interest in the water resource board's decision, including a statement of the impact the decision will have upon the petitioner.

3. The relief petitioner seeks.
4. A statement identifying the errors in the water resource board's decision which entitle the petitioner to the relief sought.
5. All facts presented to the water resource board which support the petitioner's position.
6. A legal description of the drainage area involved.
7. A map depicting the drainage area and identifying the drainage complained of.
8. A certified or cashier's check to cover the cost of preparing a transcript of the proceedings before the board.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-06. State engineer's review of board's decision. Upon receipt of a written appeal by an aggrieved party from a decision of a water resource district pursuant to North Dakota Century Code section 61-32-07, the state engineer shall review the board's decision. In the review the state engineer will consider only:

1. Ownership of the land on which the drain is located.
2. Topographic maps and aerial photographs of the area.
3. Any existing surveys of the area.
4. The documentation and testimony given to the board for its consideration.
5. Any pertinent rules of the appropriate board.
6. The board's decision.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-07. Sufficiency of information on appeal.

1. Once the state engineer's review under section 89-02-04-06 is complete, the state engineer will determine whether the information reviewed is sufficient to make a sound decision.
2. If the information is not sufficient, the state engineer will either conduct further investigations or return the record to the board for its further investigation.
3. If the information is sufficient, the state engineer shall determine whether a drain, lateral drain, or ditch has been opened or established contrary to North Dakota Century Code title 61 or any rules adopted by the state engineer or the board. If so, the state engineer will take one of the three actions set forth in North Dakota Century Code section 61-32-08. If the drain has not been opened contrary to North Dakota Century Code title 61 or a drainage rule, the complaint shall be dismissed. In either case the state engineer will notify all parties of the state engineer's decision by certified mail or by regular mail provided the state engineer files an affidavit of service by mail indicating upon whom the decision was served. The notice of decision will include the names and addresses of all parties.

History: Effective October 1, 1988; amended effective August 1, 1994.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 28-32-13, 61-32-08

89-02-04-08. State engineer's independent investigation. After reviewing the board's decision and the items identified in section 89-02-04-06, the state engineer may conduct his own investigation if the information is insufficient. The investigation may include an onsite inspection and survey of the property involved and other activities deemed appropriate by the state engineer. Any investigation the state engineer undertakes in response to a complaint filed with the state engineer because a board has not acted will be conducted pursuant to this rule.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-09. Demand for hearing by affected landowner. Hearings demanded pursuant to North Dakota Century Code section 61-32-08 by an affected landowner must be made by certified mail within fifteen days of the state engineer's decision. The affected landowner shall also notify all parties by certified mail of the state engineer's demand for hearing within fifteen days of the state engineer's decision.

Hearings will be conducted as set forth in sections 89-02-04-11 through 89-02-04-23. The demand must state the issues to be addressed at the hearing.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 61-32-08

89-02-04-10. Request for hearing by others than affected landowners. Any aggrieved party may request a hearing on the state engineer's decision. A request for a hearing must specifically state the reason for the request, and a copy of the request must be sent by certified mail to the state engineer and to each party within fifteen days after notice of the state engineer's decision has been mailed. If granted, the hearing must be conducted as set forth in sections 89-02-04-11 through 89-02-04-23.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-11. Appointment of hearing officer. Upon receipt of an appeal or demand for a hearing, the state engineer will appoint a hearing officer to:

1. Determine if the appeal is timely and proper.
2. Preside over the hearing.
3. Administer the prehearing activities.
4. Prepare a recommended decision.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-12. Purpose of hearing. If the hearing officer determines a hearing should be held, one will be conducted to:

1. Obtain further testimony from the parties.
2. Allow the state engineer to examine other witnesses and evidence.
3. Provide the parties with an opportunity to cross-examine witnesses called by the state engineer.

4. Allow the parties to call other witnesses to present evidence.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-13. Qualifications of witnesses at state engineer's hearings.

Unless agreed to by both petitioner and respondent and allowed by the hearing officer, no persons who failed to participate in the water resource board's determination under North Dakota Century Code section 61-32-07 may be called to present evidence or testimony for consideration. However, the state engineer may call witnesses on the state engineer's own motion without the agreement of any party if the state engineer feels information known by the person will assist the hearing officer in making his recommended decision.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-14. Notice of hearing. When the hearing officer determines a date for a hearing, the hearing officer will notify the water resource board, the petitioner, and the respondent of the time and date of the hearing. In the case of a demand by an affected landowner pursuant to section 89-02-04-09, the hearing officer shall give the notice of the hearing date within fifteen days of the demand. The notice must be given by certified mail not less than forty-five days prior to the date set for the hearing. All hearings will be held in Bismarck, North Dakota.

The notice must state that parties may present testimony at the hearing, petitioner and respondent may call witnesses at the hearing, and of the hearing officer's appointment as hearing officer. The notice shall also state that each party shall identify the position it is urging the state engineer to adopt. Those urging the state engineer's decision should be affirmed must be designated respondents. Those urging reversal or modification of the state engineer's decision must be designated petitioners.

History: Effective October 1, 1988; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-05, 61-03-22, 61-32-08

89-02-04-15. Issues limited to those contained in notice. The notice of hearing will identify the issues to be addressed and identified in the demand or the request for a hearing. Evidence and testimony at the hearing will be limited to the issues set forth in the notice of hearing.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 28-32-08, 61-03-22, 61-32-08

89-02-04-16. Notice of witnesses at hearing - Time frame. At least thirty days prior to the date set for the hearing, the petitioner shall notify other parties, the board, the state engineer, and the hearing officer by certified mail of all witnesses the petitioner will call and the content of their testimony. At least thirty days prior to the date set for the hearing, the respondent shall notify other parties, the board, the state engineer, and the hearing officer by certified mail of witnesses to be called by the respondent and the content of their testimony. Within twenty days of the date of the hearing, the petitioner shall notify the parties, the board, the state engineer, and the hearing officer by certified mail of any rebuttal witnesses to be called and the content of their testimony. The state engineer shall notify the parties, the board, and the hearing officer of any witnesses the state engineer intends to call in the notice of hearing. However, if testimony or evidence not provided to the board and not considered in the state engineer's determination will be presented by others, the failure of the state engineer to identify a witness should not preclude the state engineer from providing other testimony and evidence of a technical nature.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-17. Subpoena of witnesses. If any party desires the hearing officer to subpoena any witness for attendance at the hearing, the hearing officer must be notified of the intent to subpoena the witness at least seven days prior to the date of the hearing. The hearing officer may not subpoena a witness unless the request for a subpoena:

1. Is written.
2. States the subject matter of the testimony to be given.
3. States the time and date upon which the witness is to appear.
4. Is accompanied by a certified check for the fees allowed by law for one day for such witness. The fees allowed by law include, but are not limited to, mileage to and from the hearing, per diem, and in the case of the state engineer's staff, the salary for that individual.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-05(13), 61-03-13

Law Implemented: NDCC 28-32-09, 61-03-05, 61-32-08

89-02-04-18. Prehearing conference. A prehearing conference to clarify issues, resolve any conflicts, and stipulate to any matter will be held at least seven days prior to the date of the hearing. At the conference the parties shall provide sufficient copies of exhibits to be presented to all parties, the board, the state engineer, and the hearing officer. The hearing officer may allow the prehearing conference to be held by telephone if exhibits are provided to all parties, the board, the state engineer, and the hearing officer at least three days prior to the prehearing conference.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-19. Order of presentation at hearing. At the hearing the petitioner shall present the petitioner's case first. The respondent then presents the respondent's case, followed by the board and the state engineer. After all participants have presented their case, a participant may present other evidence or testimony to rebut that presented by another participant.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-20. Cross-examination. Oral cross-examination of adverse witnesses shall be allowed by the petitioner and the respondent. Each side, petitioner and respondent, shall designate one individual to cross-examine witnesses which that side did not call. In addition, the state engineer and the board may cross-examine any witnesses which they did not call. However, if a party demonstrates to the hearing officer that the party's position is not adequately represented by any other party it may be allowed to cross-examine witnesses on the party's own.

History: Effective October 1, 1988.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-03-22, 61-32-08

89-02-04-21. Record of hearing - Consideration by hearing officer. After the hearing is over the record will be closed. The hearing officer will consider only material contained in the record and will not accept and consider any information after the hearing unless the evidence was not provided at the hearing because of circumstances beyond the control of the party presenting the evidence. Information submitted after the hearing may be considered by the state engineer in making the state engineer's decision, but only in accordance with North Dakota Century Code section 28-32-07.

History: Effective October 1, 1988.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-07, 61-32-08

89-02-04-22. Recommendation of hearing officer. After the hearing officer completes the consideration required under section 89-02-04-20, a written recommendation must be made to the state engineer.

History: Effective October 1, 1988.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-32-08

89-02-04-23. Decision of state engineer on record of hearing. The state engineer will review the record, the hearing officer's recommendation, and any additional evidence received pursuant to North Dakota Century Code section 28-32-07, and make a final determination. If the conclusion is the drain, lateral drain, or ditch was constructed contrary to a board rule or title 61, the state engineer will take one of the actions prescribed by North Dakota Century Code section 61-32-08.

If the report concludes the drain, lateral drain, or ditch was lawfully constructed, the complaint will be dismissed.

History: Effective October 1, 1988.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 28-32-07, 61-32-08

CHAPTER 89-02-05
LICENSES FOR EMERGENCY DRAINAGE

[Repealed effective February 1, 1997]

CHAPTER 89-02-05.1 LICENSES FOR EMERGENCY DRAINAGE

89-02-05.1-01. Scope of chapter. This chapter contains rules concerning temporary emergency drainage licenses.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-02. Definitions. Unless the context otherwise provides, the following definitions apply:

1. "Application" means an application for licensure for an emergency drain.
2. "Board" means the board of the water resource district in which the emergency drainage license is sought.
3. "Drain" means any structure or construction which changes the water surface area of a pond, slough, lake, or sheetwater, or any series thereof, having a watershed of eighty acres [32.37 hectares] or more.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-03. Emergency drain - Licensure to be temporary. A license received under this chapter has a duration of not more than six months unless extended as provided in this chapter.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-04. Emergency defined. An emergency for purposes of this chapter is a situation which if not addressed immediately will cause significant damage to persons or property which would not occur under normal circumstances. An emergency may exist as a result of an extremely wet cycle. However, damages caused by deliberate acts of any individual do not constitute an emergency under this chapter unless the damage can be alleviated without harm to other persons or property.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-05. Form of application for an emergency drain. Applications for an emergency drainage license must be written and must contain the following information:

1. Landowner's name and address.
2. Legal description of land on which the emergency drain will be located.
3. A map showing the location of the drain.
4. An estimate of the surface acreage of the pond, slough, lake, or sheetwater, or any series thereof, and the volume of water to be drained by the emergency drain.
5. A list of all landowners whose land is adjacent to the course the water drained will take for a distance of one mile [1.6 kilometers] downstream, along with the addresses and telephone numbers of these landowners.
6. Copies of any written permission received from downstream landowners.
7. A compilation of any written or oral refusals from downstream landowners to give permission.
8. A description of the emergency.
9. Written permission allowing the state engineer and board to inspect the drain.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-06. Procedure for consideration of emergency drain applications. An application for an emergency drain must be sent simultaneously to the board and the state engineer. The application will be reviewed for completeness by the board and the state engineer. The board and state engineer shall also make a preliminary determination as to the existence of an emergency. As soon as possible, a conference call or an onsite meeting among the board, the state engineer, and other affected parties, as determined by the state engineer, must be held. The applicant or any other affected party may make a statement concerning the emergency drainage

application during the conference call or onsite meeting. Any conference call or onsite meeting must be electronically recorded. During the call or meeting, but after all parties have been given an opportunity to present their views, the board shall make a recommendation to the state engineer whether or not the license should be granted.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-07. Decision on emergency license application - Conditions.

After completion of the conference call or onsite meeting, the state engineer shall consider the written information received, the matters discussed during the conference call or onsite meeting, and the recommendation of the board. Based upon this information, the state engineer shall decide whether the emergency license should be granted. If the license is granted, the state engineer may place any condition upon it which the state engineer deems necessary to protect public or private interests. A condition may include a requirement for a bond. The license must contain a condition limiting the duration of the license to a timeframe of not greater than six months.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-08. Requirement for permanent drainage application. If the drain is to be permanent, the applicant shall submit a drainage permit application to the state engineer in accordance with chapter 89-02-01. If the application is submitted no later than thirty days prior to the date the emergency license expires, the term of the emergency license is extended until final action on the drainage permit application has been taken unless the state engineer determines that the drain should be closed to prevent damage to public or private interests.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-09. Closure of temporary drain. If an application for a permanent drainage permit is not submitted thirty days prior to the date the emergency license expires, the applicant shall immediately make preparations for closure of the drain unless the applicant has applied in writing for an extension from the state engineer and that extension has been granted. Preparations must include entering by other individuals, obtaining any permission necessary from other landowners, and obtaining any permission or authorizations necessary. Closure of the drain must be completed on

or before the license expiration date. The applicant shall keep the board and the state engineer informed of the applicant's progress in closing the drain.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03

89-02-05.1-10. License does not absolve liability for damages. The receipt of a license for emergency drainage does not relieve an applicant from liability for damages resulting from any activity conducted pursuant to the license.

History: Effective June 1, 1998.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-32-03